

Thomas A. Foster, Esq. (SBN 55640)
MARRONE, ROBINSON, FREDERICK & FOSTER
111 North First Street, Suite 300
Burbank, CA 91502-1851
Phone: (818) 841-1144
Fax: (818) 841-0746

Attorneys for Defendant,
ACCEPTANCE INSURANCE COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA - San Francisco Division

AIU INSURANCE COMPANY, a New York corporation,)
Plaintiff,)
vs.)
ACCEPTANCE INSURANCE COMPANY, a Delaware corporation, TIG SPECIALTY INSURANCE COMPANY, a California corporation, ROYAL INSURANCE COMPANY OF AMERICA, a Delaware corporation, AMERICAN SAFETY RISK RETENTION GROUP, IND., a Vermont corporation, and DOES 1 through 10, inclusive,)
Defendants.)
CASE NO. C 07-05491 PJH
NOTICE OF JOINDER AND JOINDER OF ACCEPTANCE INSURANCE COMPANY IN TIG'S MOTION FOR JUDGMENT ON THE PLEADINGS
Date : October 29, 2008
Time : 9:00 a.m.
Place : Courtroom 3

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant ACCEPTANCE INSURANCE COMPANY (hereinafter, "ACCEPTANCE") hereby joins in the Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points and Authorities filed in support thereof by Defendants TIG INSURANCE COMPANY (hereinafter, "TIG"), scheduled to be heard on October 29, 2008 at 9:00 a.m. before the Honorable Phyllis J. Hamilton in Courtroom 3, on the 17th Floor of the United States

1 Courthouse, located at 450 Golden Gate Avenue in San Francisco, California.
2

3 DATED: September 5, 2008

4 MARRONE, ROBINSON, FREDERICK & FOSTER
5 A Professional Corporation

6 By: 
7 THOMAS A. FOSTER,
8 Attorneys for Defendant,
9 ACCEPTANCE INSURANCE COMPANY

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1 **JOINDER IN TIG INSURANCE COMPANY'S MEMORANDUM OF POINTS AND**
 2 **AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

4 **I. INTRODUCTION**

5 Defendant ACCEPTANCE INSURANCE COMPANY ("ACCEPTANCE") joins in the
 6 Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points and
 7 Authorities filed in support thereof (collectively, "Motion") by Defendant TIG Insurance ("TIG").

8 The reasons that support TIG's Motion apply with equal force to ACCEPTANCE; namely,
 9 that AIU's Second Cause of Action for Declaratory Relief, Fourth Cause of Action for Equitable
 10 Indemnity Contribution, and Fifth Cause of Action for Equitable Subrogation, each fail to state
 11 claims upon which relief can be granted as to ACCEPTANCE. ACCEPTANCE is not named as a
 12 defendant with respect to any other cause of action. Thus, ACCEPTANCE joins each and every part
 13 of TIG's Motion.

14 For the reasons set forth in TIG's Motion, AIU's second, fourth and fifth causes of action,
 15 as against ACCEPTANCE must be dismissed.

17 **II. ALLEGATIONS IN PLAINTIFF'S FIRST AMENDED COMPLAINT**

18 **A. AIU Excess Policies**

19 ACCEPTANCE joins this portion of TIG's Motion, describing AIU's Excess Policies.

20 **B. ACCEPTANCE Primary Policies**

21 AIU's First Amended Complaint states that ACCEPTANCE issued the following primary
 22 liability policies to Rylock Company, Ltd. ("Rylock"): (1) Policy no. C2CG0053, effective March
 23 1, 1992 to March 1, 1993 [cite FAC ¶ 14]; (2) Policy no. C93G0194, effective March 1, 1993 to
 24 March 1, 1994 [cite FAC ¶ 14]; (3) Policy no. C94G0370 effective March 1, 1994 to March 1,
 25 1995 [cite FAC ¶ 14]; (4) Policy no. C95CG60598, effective March 1, 1995 to March 1, 1996
 26 [cite FAC ¶ 14]; (collectively, "ACCEPTANCE Policies"). The ACCEPTANCE Policies are
 27 attached to the FAC as Exhibits "C," "D," "E" and "F" [cite FAC ¶ 14];

28 As noted in TIG's Motion, AIU's Fist Amended Complaint does not contain any allegations

1 that the coverage periods of TIG's insurance policy, overlapped with AIU's coverage period. The
 2 same holds true for ACCEPTANCE -- the First Amended Complaint does not contain any allegations
 3 that any policy period of any of the ACCEPTANCE Policies overlapped with AIU's coverage period.

4 **C. The Underlying Litigation**

5 ACCEPTANCE joins this portion of TIG's Motion, describing the subject of the underlying
 6 litigation.

7 **D. AIU's Second, Fourth, and Fifth Claims for Relief**

8 **1. Second Claim for Declaratory Relief**

9 ACCEPTANCE joins this portion of TIG's Motion, describing AIU's Second Claim for
 10 declaratory relief.

11 **2. Fourth Claim for Equitable Indemnity and Contribution**

12 ACCEPTANCE joins this portion of TIG's Motion, as the same allegations are made against
 13 ACCEPTANCE, as against TIG, and AIU fails equally, as against both defendants, to specify how
 14 much, if anything, AIU has paid in defense and indemnity of Rylock in the underlying actions.

15 **3. Fifth Claim for Equitable Subrogation**

16 ACCEPTANCE joins this portion of TIG's Motion, as the same allegations are made against
 17 ACCEPTANCE, as against TIG.

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 19 **III. LEGAL ARGUMENT**

20 **A. Standard for Motion for Judgment on the Pleadings**

21 ACCEPTANCE joins this portion of TIG's Motion, as the same standard applies against
 22 ACCEPTANCE.

23 **B. AIU's Second Claim for Declaratory Relief Is Duplicative of its Other Claims and**
 24 **Should Be Dismissed**

25 ACCEPTANCE joins in this portion of TIG's Motion, as the second cause of action for
 26 declaratory relief is subject to dismissal since it would serve no useful purpose and would be
 27 uneconomical for the Court to address the merits of the claim, given that AIU's claims for equitable
 28 indemnity and contribution and for equitable subrogation present the same issues, and are thus,

1 duplicative.

2 **C. AIU Cannot State a Claim for Equitable Contribution or Equitable Indemnity**

3 ACCEPTANCE joins this portion of TIG's Motion, as ACCEPTANCE was also a primary
 4 level carrier, and AIU, as an excess carrier, did not share the same level of obligation on the same
 5 risk to Rylock. Thus, under California law, AIU has no right to equitable contribution or equitable
 6 indemnity from ACCEPTANCE for the same reasons AIU is not entitled to equitable contribution
 7 or equitable indemnity from TIG.

8 **D. AIU Has Not Stated a Claim for Equitable Subrogation**

9 ACCEPTANCE joins this portion of TIG's Motion, as any payments made by AIU on
 10 account of property damage first manifesting during ACCEPTANCE's policy period were voluntary
 11 in nature and thus not recoverable under an equitable subrogation theory, for the same reasons
 12 similar payments made during TIG's policy period were voluntary and thus unrecoverable. AIU's
 13 Equitable subrogation claim is also defective because AIU's First Amended Complaint fails to allege
 14 payment of a sum certain to Rylock in satisfaction of obligations for which ACCEPTANCE was
 15 liable, just as it failed to allege as against TIG.

16 **1. Overview of Equitable Subrogation**

17 ACCEPTANCE joins this portion of TIG's Motion, as the same principles apply as to
 18 ACCEPTANCE.

19 **2. Any Payments Made by AIU for Losses Which Acceptance Is Primarily
 20 Liable for Were Voluntary**

21 ACCEPTANCE joins this portion of TIG's Motion. Again, any payments made by AIU on
 22 account of property damage first manifesting during ACCEPTANCE's policy period were voluntary
 23 in nature since AIU had no obligation to make said payments, and California law bars recovery of
 24 such payments under an equitable subrogation theory.

25 **4. AIU Has Not Alleged Any Specific Amounts it Paid**

26 ACCEPTANCE joins this portion of TIG's Motion. Again, AIU's failure to alleged
 27 damages in a liquidated amount renders AIU's equitable subrogation claim equally defective against
 28 ACCEPTANCE, as it is against TIG, thus, warranting dismissal.

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1 **IV. CONCLUSION**

2 For all of the reasons set forth herein, AIU's second, fourth and fifth, causes of action against
3 ACCEPTANCE should be dismissed for the same reasons as set forth in TIG's Motion: each fails
4 to state a claim upon which relief can be granted as against ACCEPTANCE.

5
6 DATED: September 5, 2008

7 MARRONE, ROBINSON, FREDERICK & FOSTER
8 A Professional Corporation

9 
10 By: _____
11 THOMAS A. FOSTER,

12 Attorneys for Defendant,
13 ACCEPTANCE INSURANCE COMPANY

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1 PROOF OF SERVICE
 2 C.C.P. §1013a

3 I, the undersigned, declare that I am, and was at the time of service of the papers herein
 4 referred to, over the age of 18 years and not a party to the within action or proceeding. My business
 5 address is 111 North First Street, Suite 300, Burbank, California 91502-1851. I am employed in the
 6 County of Los Angeles, State of California, where this mailing, facsimile and/or delivery is
 7 occurring.

8 On the date of this declaration, I have caused this document, i.e., NOTICE OF JOINDER
 9 AND JOINDER OF ACCEPTANCE INSURANCE COMPANY IN TIG'S MOTION FOR
 10 JUDGMENT ON THE PLEADINGS to be served in the manner described below upon the following
 11 party(ies):

<p>12 Attorneys for Plaintiff, AIU INSURANCE 13 COMPANY:</p> <p>14 Laura J. Ruettgers, Esq. 15 Christina M. Vavanier, Esq. 16 McCurdy & Fuller LLP 17 4300 Bohannon Drive, Suite 240 18 Meno Park, CA 94025 (650) 618-3500 - phone / (650) 618-3599 - fax (laura.ruettgers@mccurdylawyers.com)</p>	<p>12 Attorneys for Defendant, ROYAL 13 INDEMNITY COMPANY</p> <p>14 Mary E. McPherson, Esq. 15 Tressler, Soderstrom, Maloney & Priess LLP 16 3070 Bristol Street, Suite 450 17 Costa Mesa, CA 92626 18 (714) 429-2900 - phone / (714) 429-2901 - fax (mmcperson@tsmp.com)</p>
<p>12 Attorneys for Defendant, TIG INSURANCE 13 COMPANY</p> <p>14 Semha Alwaya, Esq. 15 Trelawney James-Riechert, Esq. 16 Law Offices of Semha Alwaya 17 2200 Powell Street, Suite 110 18 Emeryville, CA 94608 (510) 595-7900 - phone / (510) 595-9049 - fax (salwaya@alwayalaw.com)</p>	<p>12 Attorneys for Defendant, AMERICAN 13 SAFETY RISK RETENTION GROUP, INC.</p> <p>14 David S. Blau, Esq. 15 Law Offices of David S. Blau 16 6080 Center Drive, Suite 210 17 Los Angeles, CA 90045 18 (310) 410-1900 - / (310) 410-1901 - fax david@blaulaw.net</p>

19 **20 BY ELECTRONIC FILING AND SERVICE VIA CM/ECF** - on September 5, 2008, I
 filed the foregoing documents, described above, through the use of the United States District
 Court's CM/ECF electronic filing system.

21 (Federal) I declare that I am employed in the office of a member of the Bar of this Court at
 whose direction this service was made.

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 23 Micheline Valenti
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